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In the Supreme Court of the United States

October Term, 1950

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v.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 35

WATERMAN STEAMSHIP CORPORATION, PETITIONER

v.

DUGAN & MCNAMARA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania filed no written opinion in directing a verdict against the petitioner (R. 13–17). The first opinion of the United States Court of Appeals for the Third Circuit (R. 20–26), later withdrawn, is reported at 1959 AMC 411. The second opinion of the Court of Appeals (R. 32–37) is reported at 272 F. 2d 823.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1959 (R. 38). The petition for certiorari was filed on February 11, 1960, and granted

on March 28, 1960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a shipowner has a right of indemnity directly against a stevedoring contractor hired by the consignee of the ship's cargo, when the shipowner suffers a liability *in personam* as a result of the contractor's breach of warranty of workmanlike service.

STATEMENT

Petitioner Waterman Steamship Corporation is the owner of the vessel S.S. *Afoundria*. Respondent, Dugan & McNamara, Inc., a stevedoring contractor, was engaged in unloading the vessel in Philadelphia on August 9, 1952, when Jasper King, one of its longshoremen, was injured by being struck by several one-hundred pound bags of sugar (R. 3–5). King sued petitioner in the Eastern District of Pennsylvania, alleging that the bags had fallen on him as a result of petitioner's negligence and the unseaworthiness of the vessel.

Petitioner thereafter entered into a settlement agreement under which it paid King $6,867.55 (R. 9, 14),[1] and filed a third-party complaint against respondent to recover it. This complaint, as amended (R. 7–10), asserted that respondent had adopted an unsafe unloading procedure under which tiers of bags were allowed to stand at a height of six feet or more

[1] Respondent has agreed that this represented a reasonable settlement for King's injury, assuming petitioner was liable for King's injuries (see respondent's brief in opposition to the petition for certiorari, p. 4).

without support, and that this failure "to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner under the circumstances" was the direct, proximate, and substantial cause of the injury to King (R. 8–9).

At the trial, the parties stipulated that there was no express agreement between petitioner and respondent for the unloading of the ship (R. 12–13).[2] The district court directed a verdict on the ground that, since there was no direct contractual relationship between petitioner and respondent, petitioner had no right of indemnity against the respondent (R. 16).[3]

Petitioner appealed to the Court of Appeals for the Third Circuit. On January 16, 1959, that court, *en banc*, Chief Judge Biggs dissenting, filed an opinion affirming the district court on the basis of the lack of contractual relationship between the parties (R. 20–26).

On February 24, 1959, this Court held that a ship, liable *in rem* to a longshoreman as a result of the failure of the stevedoring contractor to perform its work safely, is entitled to indemnity from the con-

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[2] It appears that the National Sugar Refining Company, as consignee of the S.S. *Afoundria's* cargo of sugar, engaged the respondent to unload it (R. 15, 35).

[3] The court also stated that the evidence disclosed no negligence on the part of petitioner and that the sole cause of the accident was respondent's negligence in allowing the bags to be piled too high. Hence, the court reasoned, petitioner, never liable to King, had made its settlement with him "as a volunteer", and could not recover indemnity from the respondent, even if it might have a right to indemnity for amounts paid by it where it was actually liable. See p. 13, *infra*, fn. 6.

tractor directly despite the absence of direct contractual relationship between the contractor and the owner. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423. The Court of Appeals thereupon withdrew its first opinion and granted a rehearing (R. 27, 31).

On November 5, 1959, the court again affirmed the district court's judgment. The court distinguished *Crumady* on the grounds that (1) the stevedoring contractor in *Crumady* had dealt with the charterer of the ship, while here the contractor had been engaged by the consignee of the cargo (see p. 3, *supra*, fn. 2), and (2) in *Crumady*, the ship itself was seeking indemnity for a liability suffered by it *in rem*, while in this case the shipowner claimed indemnity for its liability *in personam*.

INTEREST OF THE UNITED STATES

That a shipowner possesses a right of indemnity by reason of the stevedoring contractor's warranty of workmanlike service was settled in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, and reaffirmed in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, in both of which cases the United States participated as *amicus curiae*. And in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, where the United States again participated as *amicus curiae*, this Court made it clear that the contractor's warranty, and hence the right to indemnity for losses resulting from its breach, inures to the ship regardless of whether or not there was a direct contractual relationship between the stevedoring contractor and the

vessel's owners. As in *Ryan, Weyerhaeuser,* and *Crumady,* the United States, as not only the world's largest shipowner, but also the world's largest consignor and consignee of cargoes, and in that capacity an employer of stevedoring contractors on behalf of private shipowners, is directly interested in the question posed in the present case—*i.e.,* whether circuity may be avoided and the right of indemnity asserted directly by the shipowner against the stevedoring contractor when the contractor was hired for the ship by the consignor or consignee of the cargo, and when as a result of the contractor's breach of warranty, the shipowner suffers liability *in personam.* Unless the ship's claim for breach of warranty can be thus asserted directly against the contractor, in line with *Crumady,* it will be necessary for the shipowner first to sue the United States (or other consignor or consignee who hired the stevedore contractor) on its contract of carriage with the shipowner and then for the consignor or consignee, in its turn, to seek recovery over on its contract with the stevedore.

SUMMARY OF ARGUMENT

When a stevedoring contractor goes aboard a ship to perform the shipowner's stevedoring requirements, the contractor warrants that it will perform its service competently and safely. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Co.,* 350 U.S. 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.,* 355 U.S. 563. This warranty affords the ship a right of indemnity for liability *in rem* suffered by it as a result of the stevedoring contractor's breach of warranty, despite the fact

that the contractor was engaged to serve the ship by its charterer, rather than by the shipowner. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423. The narrow question presented here is whether the right to indemnification, in the absence of direct contractual dealings, is affected by the fact (1) that the stevedoring contractor is hired by the consignee of the ship's cargo, rather than the charterer of the ship, or (2) that reimbursement is sought for a liability suffered by the shipowner *in personam*, rather than by the ship for a liability *in rem*. Our position is that the two bases given by the Court in *Crumady* for extending the ship's right of indemnity for losses to cases where the charterer employs the stevedoring contractor—the intent of the parties to the stevedoring contract to benefit the ship and its owners, and the foreseeability of loss by them as a result of the stevedore's breach of warranty—militate equally in favor of allowing the shipowner recovery for liability *in personam* suffered by it in cases where the contractor is hired for the ship by the consignor or consignee of the ship's cargo.

ARGUMENT

I

THE SHIPOWNER'S RIGHT TO INDEMNITY ON THE STEVEDORING CONTRACTOR'S WARRANTY EXISTS WHERE THE CONTRACTOR IS HIRED BY THE CONSIGNEE OF THE CARGO

The principal basis for the holding of the Court of Appeals that, as a matter of law, the shipowner was not entitled to recover for losses it suffered as a

result of the stevedoring contractor's breach of its warranty of workmanlike service seems to have been the fact that in this case the stevedoring contractor had boarded the vessel and performed services for its owner pursuant to an agreement with the consignee of the cargo, while in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, the stevedoring contractor had been hired by the charterer of the ship. We submit that this attempt to avoid the impact of *Crumady* is without merit. It ignores the nature of the stevedoring contractor's inescapable and essential warranty of competent and safe performance of its services, as set out in *Crumady*, in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, and in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563.

The operation of loading or unloading a vessel, historically performed by the vessel's crew, has, because of "the advantages of more modern divisions of labor" (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 96), become a "specialized service" performed for the ship and her owner by contractors. *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 61. This development, however, did not change the shipowner's absolute and non-delegable duty to provide a seaworthy vessel for a longshoreman in the employ of a contractor who boards the vessel to perform the loading or unloading portion of "the ship's work" on behalf of her owner. *Seas Shipping Co.* v. *Sieracki*, *supra*, 328 U.S. at 95. Cf. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539.

At the same time, the shipowner's right to recover indemnity from the contractor whose improper or

unsafe performance of its stevedoring service causes the shipowner to be liable under its duty to the longshoreman was made clear in *Ryan, supra.* There, the Court held that the contractor who goes aboard a vessel to perform "the ship's service with the owner's consent" (*Seas Shipping Co.* v. *Sieracki, supra,* 328 U.S. at 97) assumes, in return for its employment, "responsibility for the proper performance of all the [shipowner's] stevedoring requirements, including the discharge of foreseeable damages resulting to the shipowner from the contractor's improper performance of those requirements." 350 U.S. at 129, n. 3. See, also, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., supra,* 355 U.S. at 565. Competency and safety are, the Court said in *Ryan,* "inescapable elements of the service undertaken" and are "of the essence of [the contractor's] stevedoring contract." The contractor's "warranty of workmanlike service" was thus "comparable to a manufacturer's warranty of the soundness of his manufactured product." 350 U.S. at 133–134.[4]

In *Crumady,* this Court held that the stevedoring contractor's assumption of responsibility for safe and proper work, and for the discharge of the shipowner's damages resulting from improper performance, was not affected by the fact that the shipowner itself was

[4] The Court also recognized (350 U.S. at 133) that, as the court below stated (R. 35), a claim for indemnification on the contractor's warranty is quite different from a claim for contribution as joint tort feasors, which, under *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, cannot be brought against a contractor by a shipowner who is liable for personal injuries to one of the contractor's employees.

not the party who engaged the contractor for the performance of the stevedoring requirements. The Court stated (358 U.S. at 428–429):

> The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, "competency and safety of stowage are inescapable elements of the service undertaken." 350 U.S. at 133. They are part of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product" *id.* at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

In view of this express holding that the warranty is for the benefit of the vessel "whether the vessel's owners are parties to the contract or not", it is confusing to say, as did the court below (R. 35), that "[T]he shipowner and the stevedoring company were strangers." And we think it is immaterial that the contractor deals with the consignee of the cargo rather than with the charterer. In stressing this factual distinction between this case and *Crumady* (R. 35), the court below failed to perceive that, regardless of the identity of the person who hires the contractor on the ship's behalf, the contractor goes aboard a vessel to perform for the vessel and its owners a duty—nondelegable in nature—for whose breach the latter

remain responsible. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. Thus, regardless of who engages the stevedoring contractor—the shipowner itself, the charterer, the consignee, or any other person lawfully entitled to do so—the stevedore's essential and inescapable undertaking to perform its work carefully is, under *Crumady*, for the benefit of the ship and its owners. *Restatement of Contracts*, Section 133.[5]

Moreover, the alternative basis assigned by this Court for the result it reached in *Crumady* shows conclusively, we think, that the fact that the consignee and not the charterer engaged the stevedore on behalf of the vessel should make no difference in the outcome. As pointed out above (p. 9, *supra*), the Court concluded that the stevedoring contractor's warranty was comparable to the manufacturer's warranty of its manufactured product. *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050. Under *McPherson*, the manufacturer's liability for defects in his product extends to all those whom the manufacturer can foresee could be injured as a result of negligence in manufacture of the article. 111 N.E. at 1054, 217 N.Y. at 394. In this case, there can be no doubt that the stevedoring contractor "performing the ship's

[5] Though the record is barren on this point, the obligation of obtaining the contractor to perform the stevedoring service was necessarily undertaken by the consignee of the goods as part of its contract with the consignor, who, in turn, made such an undertaking in its contract with the shipowner. Thus, the ship and its owners are probable creditor beneficiaries. *Restatement of Contracts*, Section 133(b). However, in the unlikely event that no obligation on the part of the person hiring the stevedore could be established, the ship would clearly be a "donee beneficiary". *Id.*, Section 133(a).

service with the owner's consent" (*Seas Shipping Co. v. Sieracki, supra,* 328 U.S. at 97) can foresee—regardless of the person who engaged it to do the work—that if it fails to perform its services safely the shipowner, which has an absolute and nondelegable duty to provide a seaworthy vessel for the contractor's employees who perform its work, may suffer liability.

Thus, under one ground of the decision in *Crumady* (the intention of the stevedore and the person who engages him to do the work for the benefit of the ship and its owner) and also under the second ground (the foreseeability by the contractor of loss to the shipowner from the contractor's failure to perform the loading or unloading safely and competently) the shipowner, regardless of who engaged the stevedoring contractor, is entitled to recover from that contractor for loss resulting from the contractor's beach of its waranty to peform the ship's stevedoing requirements carefully.

II

THE RIGHT TO INDEMNITY EXISTS WHERE THE SHIPOWNER SUFFERS LOSS *IN PERSONAM*

It is similarly irrelevant that this petitioner seeks reimbursement for a personal liability undergone by it, while in *Crumady* the ship owner claimed recovery over for a liability suffered by it *in rem* as a result of the stevedoring contractor's breach of its warranty of workmanlike service.

Under *Ryan* and *Weyerhaeuser,* where the shipowner hires the contractor direct, and as a result of

the latter's breach of warranty becomes liable for failure to provide a longshoreman with a seaworthy vessel on which to work, he may recover his damages. And, in *Crumady*, where there was no direct contract between the shipowner and the contractor, indemnity was allowed a ship suffering liability *in rem* as a result of the longshoreman's injuries due to unseaworthiness.

The ship and its owner, are, of course, equally subject to liability for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U.S. 158, 175, *Robinson on Admiralty*, § 57, p. 405. There is no rational ground, then, for making indemnity dependent upon whether the longshoreman decides to sue the shipowner *in personam*, or instead to proceed against the vessel *in rem*. And the reasoning underlying the decision in *Crumady* requires that the right of recovery extend to the shipowner as well as to the ship in circumstances where the contractor is hired by someone other than the shipowner (as the right of indemnity does extend in cases where the stevedore and the owner contract directly). The owner, since it must respond in damages for the contractor's breach of warranty of workmanlike service, is, as much as the ship, the intended beneficiary of the warranty (see pp. 9–10, *supra*) and the foreseeable victim of its breach by the contractor's negligence (see pp. 10–11, *supra*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.*

Respectfully submitted.

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AUGUST 1960.

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*The court of appeals did not pass upon the second ground assigned by the district court for directing a verdict against petitioner, *viz.*, that petitioner was not negligent and hence not liable to King, and had settled with him as a volunteer. See p. 3, *supra*, fn. 3. We think this ground is without merit. The vessel was clearly made unseaworthy because of respondent's breach of its warranty of skillful performance, since it is undisputed that the bags were piled dangerously high. Under *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, a shipowner is liable in these circumstances.

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